Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

LARRY HOPE,

Petitioner,

v.

MARK PELZER, GENE MCCLARAN, and JIM GATES a/k/a KEITH GATES,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether prior case holdings articulating general statements of law are capable of giving sufficient warning to defeat qualified immunity when such a statement of law applies with obvious clarity to the type of conduct in question, even though the very action in question has not previously been held unlawful.

2) Whether state correctional officers are entitled to claim qualified immunity for subjecting inmates to prolonged, punitive restraint under circumstances which are obviously inconsistent with the constitutional principles governing necessity for and duration of restraint articulated by clearly established prior law, even though the precise method of restraint was not addressed by such prior rulings.

3) Whether longstanding Supreme Court decisions recognizing the unconstitutionality of the pillory and similar draconian devices give fair and clear warning that prolonged, punitive restraint upon a device which is the functional equivalent of the pillory is similarly prohibited.

4) Whether there are some cases, such as those involving torture, in which the constitutional right alleged to have been violated is so apparent that clarifying case law is neither available nor necessary in order to overcome a claim of qualified immunity.

PARTIES TO THE PROCEEDING BELOW

The Petitioner in this Court, Larry Hope, is an individual who was the plaintiff in the District Court and the appellant in the Court of Appeals. The Respondents, Mark Pelzer, Gene McClaran, and Jim Gates a/k/a Keith Gates, are all individuals who were the defendants in the District Court and the appellees in the Court of Appeals.

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OPINIONS BELOW

The Court of Appeals opinion that the Petitioner asks this Court to review is *Hope v. Pelzer*, 240 F. 3d 975 (11th Cir. 2001), which is reproduced in the Appendix. The District Court Opinion is *Hope v. Pelzer*, Case No. 96-02968-CV-BU-S (N.D. Ala. 3/24/00)

JURISDICTIONAL BASIS

This Petition asks the Court to review the February 2, 2001, opinion and judgment of the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals reversed in part and denied in part the decision of the District Court, which had dismissed the Petitioner's claims under 42 U.S.C. §1983 because, it held, the Respondents were entitled to qualified immunity. The Court of Appeals denied the Petitioner's petition for rehearing on May 7, 2001. Should the Court grant certiorari, it would have jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIOINS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution, Amendment VIII:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

42 U.S.C. §1983 (excerpt):

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

STATEMENT OF THE CASE

Petitioner is one of several hundred Alabama inmates who have been shackled to a metal post for extended periods without food, water, or bathroom breaks as punishment for violating prison rules. The Court of Appeals held that the use of the "hitching post" by the Alabama Department of Corrections constituted cruel and unusual punishment in violation of the Eighth Amendment. However, the Court of Appeals granted summary judgment to the Respondents on the issue of qualified immunity, ruling that Petitioner is not entitled to seek compensation for the torture inflicted upon him by officers of the State.

On May 11, 1995, while Petitioner Larry Hope was incarcerated at the Limestone Correctional Facility[1], he was working on a chain gang near an interstate highway when another inmate started an argument with him. Mistakenly concluding that the argument was Hope's fault, a

[1] Mr. Hope has since been released from prison.

correctional officer sent Hope back to the Limestone facility and ordered that he be placed on an outdoor restraining device known as the "hitching post" for being "disruptive to the work squad." However, Petitioner had neither refused to work nor incited other inmates not to work.

Upon being returned to Limestone, Petitioner was placed on the hitching post – meaning that his wrists were handcuffed to a horizontal pole that was roughly the same height as his head – in accordance with Respondent McClaran's instructions. Because Mr. Hope was just slightly taller than the hitching post itself, his arms grew tired from being handcuffed so high, and whenever he tried moving them to improve his circulation, the handcuffs would cut into his writs and cause great pain and discomfort. He was forced to stand in this position for more than two (2) hours, after which he was released because a captain determined that the other inmate – not Mr. Hope – was the one who had started the argument.

Petitioner was again placed on the hitching post on June 7, 1995, when a correctional officer picked a fight with Mr. Hope after catching him asleep on the bus en route to a job site. After a brief struggle, Mr. Hope was subdued, handcuffed, placed in leg irons, and transported back to the prison, where he was placed on the hitching post by Respondent Gates. Petitioner was photographed by national news media while he was on the hitching post that day, and photographs of his humiliation were published in the New York Times and Life magazine.

This time, Mr. Hope was left on the post without a shirt for approximately seven (7) hours, the duration of which he spent standing on his feet with his arms raised and restrained in very hot weather. As before, Hope's ordeal on the hitching post was a very painful one, and whenever he tried to shift his weight to relax one of his feet, it would put tremendous pain on his wrist. While he was on the hitching post, Mr. Hope was deprived of water and teased by two officers when he asked for water. On one occasion, they started to bring him water but ended up giving his water to some dogs. He was given some water once or twice during the entire seven hours, but that was not enough, and at one point during the hottest part of the day he was left without water for at least three hours. In addition to being deprived of water, Hope was teased by officers just for being on the hitching post. When Hope was finally released from the hitching post, his wrists were sore and appeared to be bruised. They became swollen and remained that way for at least another day.

On neither of these two occasions is there any evidence that Mr. Hope continued to pose an imminent threat of violence or disturbance after being transported from the road crew – where the incidents occurred – back to the prison, where he was placed on the hitching post. Likewise, there is no evidence suggesting that Mr. Hope was such a continuing threat to human safety or institutional security to justify being kept in a position of prolonged restraint to a fixed object for hours after any perceived threat had diminished. (App. 1-3, 6)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS DIRECTLY WITH THIS COURT'S DECISION IN *LANIER V. UNITED STATES*.

The Court of Appeals held that "while we recognize that the inappropriateness of the hitching post could be inferred from [prior case law], a bright-line rule for qualified immunity purposes 'is not to be found in abstractions – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances.' " (App. 12) The court granted the Respondents qualified immunity because, "though analogous, the facts in [the prior case law] are not 'materially similar' to Hope's situation." (App. 13)

In requiring that the facts of the case be "materially similar" to those in the prior case law, the Eleventh Circuit is attempting to sidestep this court's mandate in *United States v. Lanier*, 117 S. Ct. 1219, 1226-27 (1997), which rejected the Sixth Circuit's requirement that there be a "fundamentally similar" precedent before the law is "clearly established" enough to defeat qualified immunity." In *Lanier*, this Court held that . . . [G]eneral statements of the law are not inherently incapable of giving fair and clear warning [to the Defendants], and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specified conduct in question, even though 'the very action in question has [not] previously been held unlawful.' " 117 S. Ct. at 1226-27, quoting from *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987).

The *Lanier* decision makes it clear that some of the Courts of Appeals have taken an overly expansive view of qualified immunity, and the case at bar illustrates the extent to which this remains a problem. There is confusion among the circuits in how to interpret *Lanier* and its impact upon qualified immunity analysis with regard to the determination of clearly established law. *Compare Tellier v. Fields*, 230 F. 3d 502, 516 (2d Cir. 2000) (qualified immunity not applicable where prior case decisions "clearly foreshadowed" a decision forbidding defendant's conduct); *Kelly v. City of Oakland*, 198 F. 3d 779, 785 (9th Cir. 1999) ("where unlawfulness is apparent, qualified immunity does not exist"); and *Santemorena v. Georgia Military College*, 147 F. 3d 1337 (11th Cir. 1998) (general principles of law under *Lanier* only apply in "exceptional cases [which] rarely arise"). The case at bar provides an opportunity to clarify the law against the stark backdrop of an unequivocal fact pattern.

A. GENERAL STATEMENTS OF THE LAW ARE CAPABLE OF GIVING FAIR AND CLEAR WARNING WHERE THEY APPLY WITH OBVIOUS CLARITY TO THE CONDUCT IN QUESTION

In the court below, Petitioner relied upon three (3) Eleventh Circuit precedents which clearly establish the unconstitutionality of restraining an inmate to a fixed object and depriving him of water and bathroom breaks for prolonged periods under circumstances where the inmate does to pose a present and immediate threat. *Gates*

v. Collier, 501 F. 2d 1291, 1306 (5th Cir. 1974)[2], *Ort v. White*, 813 F. 2d 318, 327 (11th Cir. 1987), nor *Williams v. Burton*, 943 F. 2d 1572 (11th Cir. 1991). The Court of Appeals accepted the holdings of those prior cases as authority for the proposition that Petitioner was unconstitutionally placed on the hitching post, but the court rejected Petitioner's argument that the law was clearly established in light of the principles articulated by those cases.

It is not necessary that there be a "fundamentally similar" precedent before the law is "clearly established" enough to defeat qualified immunity. *United States v. Lanier*, 117 S. Ct. 119, 1226-27 (1997). In other words, there do not have to be any prior cases involving a "hitching post" in order to defeat qualified immunity where there is already "clearly established law" articulating general principles which are sufficient to put the Defendants on notice of the rights violated by their conduct. " . . . [G]eneral statements of the law are not inherently incapable of giving fair and clear warning [to officials], and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specified conduct in question, even though 'the very action in question has [not] previously been held unlawful.' " 117 S. Ct. at 1226-27, quoting from *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) Certainly the longstanding decisions of the Fifth and Eleventh Circuits cited by Petitioner were sufficient to satisfy this standard.

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[2] Decisions of the Fifth Circuit entered prior to October 1, 1981 are binding upon the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir. 1981).

Since it is the fact of unnecessary punitive restraint – rather than the precise manner of restraint – which offends constitutional principles, it does not matter that neither *Gates v. Collier*, *Ort v. White*, nor *Williams v. Burton*, *supra*, deals specifically with a device called a "hitching post". After all, *Gates* does not outlaw fences; rather, it outlaws the act of chaining inmates to fences. 501 F. 2d at 1306. Since *Gates* forbids the "hitching", it is not necessary to explicitly forbid the "post". Likewise, the rule which emerges from *Ort* and *Williams* forbids prison officials from employing any "force or other coercive measures after the necessity for such coercive action has ceased," regardless of the specific manner in which such "force or other coercive measures" is employed. 813 F. 2d at 327; *compare* 943 F. 2d at 1576. The principles elucidated by these three binding precedents were sufficiently understandable in 1995 to warn prison officials and their lawyers that it is unconstitutional to shackle an inmate outdoors for hours without food, water, or toilet breaks when there is no penological necessity for doing so.

B. PROLONGED PUNTIVE RESTRAINT IS CLEARLY INCONSISTENT WITH PRIOR DECISIONS IMPOSING LIMITS UPON THE USE AND DURATION OF RESTRAINTS

In *Gates v. Collier*, the old Fifth Circuit squarely held that the Constitution forbids "handcuffing inmates . . . for long periods of time . . . and forcing inmates to stand . . . or otherwise maintain awkward positions for prolonged periods . . . " 501 F. 2d at 1306; *see also Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir. 1981) (en banc)

(adopting as binding precedent all decisions of the Fifth Circuit prior to 10/1/81).

If that were not enough, Alabama prison officials were also put on notice by the principles applicable to the restraint of inmates which were articulated by the Eleventh Circuit in the cases of *Ort v. White*, 813 F. 2d 318, 327 (11th Cir. 1987)[3] and *Williams v. Burton*, 943 F. 2d 1572, 1576 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 3002, 120 L. Ed. 2d 877 (1992)[4]. While *Ort v. White* approved conduct by prison officials falling far short of the abuse inflicted upon the Plaintiff in this case, that decision nonetheless contained the following statement of clearly established constitutional law:

> "Clearly appellant would have a legitimate due process claim if, after the misconduct or disturbance had abated, prison officials had summarily denied him water or imposed any other form of punishment without first affording him some type of disciplinary hearing. A Fourteenth Amendment violation occurs in this context where prison officers continue to employ force

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[3] *Ort v. White, supra*, states that an inmate "would have a legitimate due process claim if, after the misconduct or disturbance had abated, prison officials had summarily denied him water or . . . continue[d] to employ force or other coercive measures after the necessity for such coercive action ha[d] ceased." 813 F. 2d at 327.

[4] *Williams v. Burton, supra*, sets forth the rule that even if "restraints are initially justified, . . . the basic legal principle is that once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Fourteenth and Eighth Amendments. . . . " 943 F. 2d at 1576.

> or other coercive measures after the necessity for such coercive action has ceased."

813 F. 2d at 327. In the case at bar, the Plaintiff has alleged that the Defendants did precisely what the Eleventh Circuit had already said they were not allowed to do.

Similarly, the *Williams* case set forth the following principle of clearly established law:

> "Once restraints are initially justified, it becomes somewhat problematic as to how long they are necessary to meet the particular exigent circumstances which precipitated their use. The basic legal principle is that once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments, and any abuse directed at the prisoner after he terminates his resistance to authority is an Eighth Amendment violation."

953 F. 2d at 1576, citing *Ort v. White*, 813 F. 2d 318, 324 (11th Cir. 1987) and *Smith v. Dooley*, 591 F. Supp. 1157, 1168 (W.D. La. 1984), *aff'd*, 778 F. 2d 788 (5th Cir. 1985).

C. THE CASE LAW RECOGNIZING THE UNCONSTITUTIONALITY OF THE PILLORY APPLIES WITH EQUAL CLARITY TO THE HITCHING POST

Black's Law Dictionary defines "pillory" as "a frame erected on a pillar, and made with holes . . . through which the heads and hands of criminals were put." The only difference between the pillory of times past and the

hitching post of today is that modern technology has substituted metal shackles for the "holes" that were constructed of movable boards before fabricated steel was readily available. One must go back a hundred years to find discussions of the "pillory" in American jurisprudence.

This Court has acknowledged that the pillory was banned by the Eighth Amendment. *Weems v. United States*, 217 U.S. 349, 376 (1910); *see also Ex Parte Wilson*, 114 U.S. 417, 428 (1884). Other courts have reached the same conclusion. *Jackson v. United States*, 102 F. 473, 488 (9th Cir. 1900); *Mickle v. Henricks*, 262 F. 687, 689-90 (D. Nev. 1918); *Davis v. Berry*, 216 F. 413, 417 (S.D. Iowa 1914); *United States v. Wong Dep Ken*, 57 F. 206, 210 (S.D. Cal. 1893); *State v. Evans*, 245 P. 2d 788, 792 (Idaho 1952); *State v. Dietz*, 119 N.W. 2d 833, 836 (Minn. 1963); *Delnegro v. State*, 81 A. 2d 241, 246 (Md. 1951); *Hobbs v. State*, 32 N.E. 1019, 1021 (Ind. 1893); *In re Opinion of the Justices*, 338 A. 2d 802, 806 (Me. 1975) (per curiam); *State v. Cannon*, 190 A. 2d 514, 517 (Del. 1963); *State v. Feilen*, 126 P. 75, 78 (Wash. 1912); *see also United States v. Trani*, 3 C.M.R. 27, 30 (C.M.A. 1952) ("court martials will not impose any punishment not sanctioned by the custom of the service such as carrying a loaded knapsack, wearing irons, shaving the head, placarding, pillory, stocks, and tying up the thumbs.").

In a 1900 case, the Ninth Circuit declined to rule that a particular punishment violated the Eighth Amendment, although it conceded that "it is true there may be exceptional cases, in relation to the whipping post, pillory, or other extreme, isolated, and exceptional cases where the courts have interfered, and held the sentence to be in

violation of the provisions of the [Constitution]." *Jackson v. United States*, 102 F. 2d 473, 488 (9th Cir. 1900), citing Cooley, Constitutional Limitations (6th ed.) at 402 (emphasis added). Such a case was *Hobbs v. State*, 32 N.E. 1019 (Ind. 1893), in which the Supreme Court of Indiana held that the "cruel and unusual punishment" clause applied to punishments "such as that inflicted at the whipping post, in the pillory, . . . etc." 32 N.E. at 1021.

The *Hobbs* decision is significant for qualified immunity purposes in that it was cited with approval by this Court in the celebrated case of *Weems v. United States*, 217 U.S. 349, 376 (1909). In *Weems*, this Court declared that the pillory had already long been abolished – not by judicial fiat but by public opinion – long before the Eighth Amendment was ever held to be applicable to the states by virtue of the Fourteenth Amendment. ". . . [I]t may be well doubted if the rights exist[s] to establish the whipping post and the pillory in those States where they were never recognized as instruments of punishment, or in the States whose constitutions, revised since public opinion had banished them, have forbidden cruel and unusual punishments." 217 U.S. at 378. Yet *Weems* was not the first time this Court pronounced the unconstitutionality of the pillory. As early as 1879, in the first case in which the Supreme Court labored over the meaning of the Eighth Amendment, the Court noted that "it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that [A]mendment." *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879), cited in *Gregg v. Georgia*, 428 U.S. 153, 170 (1976). The "Commentator referred to" was Gladstone, who had

published a list of all forms of torture which were acceptable punishments in his day. Included on that list was the pillory, which is what Alabama correctional officers now call the "hitching post". *Id.*

The very origin of the phrase "cruel and unusual punishment" has been traced to the 17th-century perjury trial of an English clergyman named Titus Oates, who was convicted and sentenced to the following: life imprisonment, a fine, whippings, defrocking, and being placed on the pillory four (4) times a year. Oates petitioned both the House of Lords and the House of Commons for relief from his sentence. A majority of the House of Commons – joined by a minority of the House of Lords – adopted a resolution concluding that these punishments, including the pillory, were "barbarous, inhumane, unchristian, and unauthorized by law." *Furman v. Georgia*, 408 U.S. 238, 318, 92 S. Ct. 2726, 33 L. Ed. 2d 346, 395, n. 13 (Marshall concurrence), citing Granucci, "Nor Cruel and Unusual Punishments Inflicted: The Original Meaning, 57 Calif. L. Rev. 839, 842 (1969). After the Oates trial, the phrase "cruel and unusual punishments" made its way into the 1689 English Bill of Rights. 428 U.S. at 170, citing 57 Calif. L. Rev. at 842. "The American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned with proscribing 'tortures' and other 'barbarous' methods of punishment." *Id.* Accordingly, the pillory – and its "modern" equivalent, the hitching post – were already considered "cruel and unusual" before the Eighth Amendment was ever adopted, let alone applied to the states by the rulings of this Court.

D. IN CASES WHERE THE RIGHT ALLEGED TO HAVE BEEN VIOLATED IS READILY APPARENT, NO CLARIFYING CASE LAW IS NECESSARY

Even if the pillory had not been abolished over a century ago, and even if the principles articulated by *Gates v. Collier*, 501 F. 2d 1291, 1306 (5th Cir. 1974), *Williams v. Burton*, 943 F. 2d 1572 (11th Cir. 1991), and *Ort v. White*, 813 F. 2d 318, 327 (11th Cir. 1987) were not controlling, the Eleventh Circuit has recognized that there are certain cases where the defendant's conduct is so obviously unconstitutional that it is not necessary that there be a factually similar precedent articulating "clearly established law." In *Smith v. Mattox*, 127 F. 3d 1416 (11th Cir. 1997), the Court rejected a police officer's defense of qualified immunity – despite the absence of a precedent with substantially similar facts staking out a "bright line" of illegality – where an unarmed, non-resisting suspect claimed that the officer had deliberately and without provocation broken his arm during the course of an arrest. In the words of the Eleventh Circuit, the unconstitutionality of the alleged conduct in *Smith* was "readily apparent even without clarifying case law." The same can be said in the case at bar, where the Respondents' practice of inflicting pain and discomfort on the "hitching post" is "surely [as] wanton, and arguably malicious and sadistic," as the conduct proscribed by the old Fifth Circuit in *Gates v. Collier, supra*, 501 F. 2d at 1306. Even if there were a complete dearth of prior case law, the impropriety of torturing inmates on the hitching post should have been as "readily apparent" at the turn of the 20th century as

that of an officer maliciously breaking the arm of a suspect, and accordingly, there is no basis for awarding qualified immunity to the Defendants.

In a similar vein, the Eleventh Circuit held in *McMillian v. Johnson*, 88 F. 3d 1554 (11th Cir. 1996), that an Alabama sheriff was not entitled to summary judgment based upon qualified immunity in a case brought by a pretrial detainee who complained of being housed on Death Row. Despite the fact that there were no prior cases prohibiting Death Row confinement of pretrial detainees, the law was held to be clearly established that punishing a pretrial detainee is unconstitutional. "When McMillian was transferred to Holman's death row, clearly established law in this circuit prohibited imposing on a pretrial detainee conditions of detention that amount to punishment." 88 F. 3d at 1565, citing *Bell v. Wolfish*, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872 (1979); and *Hamm v. Dekalb County*, 774 F. 2d 1567, 1572 (11th Cir. 1985), *cert. denied*, 475 U.S. 109, 106 S. Ct. 1492 (1986).

The fact that there are no prior case decisions outlawing the hitching post *per se* is not determinative of the qualified immunity issue. "[F]or the law to be clearly established, a court need not have found the very action in question unlawful; what is essential is that the action's unlawfulness be apparent in light of preexisting law." 88 F. 3d at 1565, citing *Jordan v. Doe*, 38 F. 3d 1559 (11th Cir. 1994) (emphasis added). "[W]e do not view the absence of a case factually similar to the extraordinary allegations in this case as an indication that the law was not clearly established that confining pretrial detainees on death row to punish them is unconstitutional. *Bell's* prohibition on any pretrial punishment, defined to include conditions

imposed with an intent to punish, should have made it obvious to all reasonable officials . . . that holding McMillian on death row to punish him before he was tried violated McMillian's due process rights." 88 F. 3d at 1565. By the same token, the prohibition on unnecessary punitive restraints contained in *Gates v. Collier*, *Ort v. White*, and *Williams v. Burton*, *supra*, "should have made it obvious" that it was unconstitutional to place Larry Hope on the hitching post and to leave him there unnecessarily.

The Eleventh Circuit's rulings in *Smith v. Mattox* and *McMillian v. Johnson* are consistent with this Court's analysis in *United States v. Lanier*, 117 S. Ct. 1219, 1226-27 (1997), which emphasizes the clarity of the guidance given by a court's decision over the specificity of its fact pattern. In *Lanier*, this Court made the following observation:

> "The easiest cases don't even arise. There has never been . . . a section 1983 case accusing child welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal liability]."

117 S. Ct. at 1227-28. The same would be true if prison officials were cutting off fingers, inserting bamboo shoots under fingernails, or reinstating the pillory in order to appear "tough on crime". Qualified immunity was never intended to be "an impenetrable shield, because of which all manner of constitutional violations by public officers must be tolerated." *Cooper v. Smith*, 89 F. 3d 761 (11th Cir. 1996). Certainly this is a case in which the rights violated

are so basic and obvious that the Petitioner should be entitled to ask a jury for compensation.

CONCLUSION

This court should grant the writ and reverse the judgment below. Petitioner is entitled to a trial to prove his claims.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12150

D. C. Docket No. 96-02968-CV-BU-S

LARRY HOPE,

Plaintiff-Appellant,

versus

MARK PELZER, GENE MCCLARAN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(Filed February 02, 2001)

Before TJOFLAT and BIRCH, Circuit Judges, and VINING*, District Judge.

BIRCH, Circuit Judge:

In this case, we decide whether an inmate's Eighth and Fourteenth Amendment rights were violated when prison guards handcuffed him to a hitching post on two occasions, one of which lasted for seven hours without regular water or bathroom breaks. The district court granted summary judgment for the defendant prison

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* Honorable Robert L. Vining, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

guards because they were entitled to qualified immunity. We AFFIRM.

I. BACKGROUND

Plaintiff-Appellant Larry Hope was an inmate at Limestone Correctional Facility ("Limestone") in 1995, where he was assigned to the chain gang. On two occasions, Hope was transported from the chain gang work site back to Limestone, where he was cuffed to a hitching post in the yard.

On 11 May 1995, Hope was engaged in a verbal altercation with another inmate on the chain gang. Both men were escorted back to Limestone, where they were cuffed to the hitching post. Hope was released two hours later, after the guards captain determined that the altercation was caused by the other inmate. While on the post, Hope was offered water and a bathroom break every fifteen minutes, and his responses to these offers were recorded on an activity log. He was examined by a prison nurse that evening, and showed no signs of injury.

On 7 June 1995, Hope was engaged in a physical altercation at the work site with a prison guard. There is a dispute about who started the fight, but Hope states that one of the guards started choking him because he fell asleep on the bus en route to the work site, and therefore did not exit promptly with the other inmates. Hope was again brought back to Limestone, where he was again cuffed to the hitching post. This time, Hope was cuffed to the post for seven hours without a shirt. During this seven hour period, Hope was given water only once or

twice, and was given no bathroom breaks.[1] He was examined by the prison nurse, who noted no injuries. Hope has since been released from prison.

Hope brought suit in federal court against eight Limestone guards,[2] alleging that his Eighth[3] Amendment rights had been violated, and seeking monetary damages. The district court ordered the defendants to submit special reports outlining their knowledge of the incidents Hope described in his complaint. The court considered these special reports as a motion to dismiss, and granted the motion on qualified immunity grounds. Hope appeals.

II. DISCUSSION

We review a summary judgment appeal *de novo*, and view all facts in the light most favorable to the nonmoving party. *See Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1454 (11th Cir.1998).

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[1] We note that there is no activity log for this period that Hope spent on the hitching post, despite the policy that requires such a report. Because there is no report, Hope's allegations about the lack of water and bathroom breaks are uncontested.

[2] Hope subsequently moved to dismiss his claims against defendants Ted Loggins, Greg Jackson, Gary McGee, Joseph Stephenson, and James Kent, leaving only Mark Pelzer, Gene McClaran and Jim/Keith Gates. In the same motion, he dropped a claim for excessive force.

[3] Hope argues that he also brought a Fourteenth Amendment due process claim. However, the district court found that the due process complaint was not signed and had no evidence of service of process. Therefore, it did not address this claim, and it is not before us now.

A. Hope's Constitutional Rights Were Violated

Alabama Department of Corrections ("DOC") policy calls for inmates to be cuffed to a hitching post[4] to "eliminate the possibility of disruption of the work squad and to discourage other inmates from exhibiting similar conduct." R1-11-8.[5] Hope argues that his Eighth Amendment right to be free from cruel and unusual punishment was violated ~~when he was cuffed to the hitching~~ post on 11 May and 7 June 1995 in accordance with this policy. We agree.[6]

The Eighth Amendment prohibits "punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society' . . . or which 'involve the unnecessary and wanton infliction of pain.' " *Estelle v. Gamble*, 429 U.S. 97, 102-03, 97 S.Ct. 285, 290 (1976) (citations omitted). Because Hope

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[4] The DOC refers to the hitching post as a "restraining bar" or a "rail." Here, we will use the term "hitching post," but the holding applies to any similar object that inmates are cuffed to in the manner described in this opinion.

[5] The written policy, Alabama Administrative Regulation Number 429, is not in the district court record, and, therefore, we will not address it here.

[6] This section of the opinion will discuss Eighth Amendment jurisprudence as it applies to Hope's case. For an analysis of the historical background of an Eighth Amendment claim against the use of a hitching post, see *Austin v. Hopper*, 15 F.Supp.2d 1210, 1250-66 (M.D.Ala.1998). Because Hope is a member of the plaintiff class in *Austin*, that court discusses his allegations in its opinion. The case before us is a separate action, in that Hope is asking for monetary damages rather than injunctive relief, but the *Austin* court's analysis is sound and directly applicable to our case.

was not placed on the hitching post as the result of a court sentence or sentencing statute, he must prove a subjective violation of his rights as well as the objective violation of the Eighth Amendment. *See Wilson v. Seiter*, 501 U.S. 294, 300, 111 S.Ct. 2321, 2325 (1991).

1. The Subjective Requirement

The subjective component of Eighth Amendment jurisprudence requires a showing that the defendants were wanton in their actions, as opposed to merely negligent. *Id.* at 302, 111 S.Ct. at 2326. To overcome this subjective test, Hope must show that the officials knew that placing him on the hitching post created a "substantial risk of serious harm and [that they] disregard[ed] that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S.Ct. 1970, 1984 (1994).[7] The Court in *Farmer* emphasized that the officials need only be aware of the *risk* of harm, as opposed to being aware of actual harm. *Id.* at 842, 114 S.Ct. at 1981.

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[7] We disagree with the district court in *Austin* in so far as the opinion applies the heightened subjective test found in *Whitley v. Albers*, 475 U.S. 312, 106 S.Ct. 1078 (1986), to the subjective element of Hope's claim. *Austin*, 15 F.Supp.2d at 1255. The *Whitley* test applies when officials act "in haste, under pressure, and frequently without the luxury of a second chance." *Whitley*, 475 U.S. at 320, 106 S.Ct. at 1084. Because the officers drove Hope back to Limestone before placing him on the hitching post, they no longer faced the type of exigent circumstances required to invoke the *Whitley* standard. We note, however, that despite applying the more stringent *Whitley* standard to Hope's case, the district court in *Austin* still found that Hope had met the subjective component of the Eighth Amendment analysis. *Austin*, 15 F.Supp.2d at 1265.

Hope has met the burden of showing that the prison officials were aware that placing him on the hitching post created a substantial risk of harm, and that they did nothing to abate that risk. First, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* Hope was cuffed standing to a hitching post, with his arms at approximately head level, in the hot sun for seven hours with no shirt, metal cuffs, only one or two water breaks, and no bathroom breaks. At one time, prison guards brought a cooler of water near him, let the prison dogs drink from the water, and then kicked the cooler over at Hope's feet. This is uncontested evidence of deliberate indifference to the risk of harm to Hope.

Second, in 1994, the Department of Justice ("DOJ") conducted an examination of the Easterling Correctional Facility in Alabama, and advised the DOC that use of the hitching post constituted improper corporal punishment and was not an acceptable use of restraints. *Austin*, 15 F.Supp.2d at 1249.[8] In this report, the DOJ recommended that the DOC cease use of the hitching post in order to meet constitutional standards. The DOJ report listed the health and safety risks associated with the use of the hitching post. The DOC replied to the report, stating that

[8] Although this DOJ report was not before the district court in Hope's case, we are taking judicial notice of the report as permitted by Federal Rule of Evidence 201. *See United States v. Rey*, 811 F.2d 1453, 1457 n. 5 (11th Cir.1987) ("A court may take judicial notice of its own records and the records of inferior courts."); *National Fire Ins. Co. of Hartford v. Thompson*, 281 U.S. 331, 336, 50 S.Ct. 288 (1930) ("We may notice the record of that case in this court.").

it had determined that use of the hitching post "is not unconstitutional and is necessary to preserve prison security and discipline." *Id.* In response, the DOJ informed the DOC that, "[a]lthough an emergency situation may warrant drastic action by corrections staff, our experts found that the 'rail' is being used systematically as an improper punishment for relatively trivial offenses. Therefore, we have concluded that the use of the 'rail' is without penological justification." *Id.* at 1249-50. This exchange between the DOJ and the DOC demonstrates that the DOC was aware of the substantial risk of harm created by use of the hitching post for prolonged periods of time. We find that Hope has satisfied the subjective requirement of the Eighth Amendment test.

2. The Objective Requirement

The standard for an objective violation of the Eighth Amendment is whether a punishment " 'involve[s] the unnecessary and wanton infliction of pain' . . . or [is] grossly disproportionate to the severity of the crime." *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S.Ct. 2392, 2399 (1981) (citations omitted). Because there is no clear test for what actions meet this standard, "the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' " *Id.* (citations omitted). This standard of decency must be balanced, of course, against the prison officials' need to keep the prison safe. However, an infliction of pain "without penological justification" is considered to be "unnecessary and wanton." *Id.* (citations omitted).

Since abolishing the pillory over a century ago, our system of justice has consistently moved away from forms of punishment similar to hitching posts in prisons. In *Gates v. Collier*, 501 F.2d 1291 (5th Cir.1974), in regard to "handcuffing inmates to the fence and to cells for long periods of time" and other such punishments, we stated that "[w]e have no difficulty in reaching the conclusion that these forms of corporal punishment run afoul of the Eighth Amendment, offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess." *Gates*, 501 F.2d at 1306.

Hope has met the objective standard of the Eighth Amendment. While on the hitching post in June, Hope was denied basic human necessities, such as water, and was even taunted by the guards in the process. While cuffed to the hitching post, Hope ran the obvious risk of becoming dehydrated or sunburned, injuring his wrists, or being ridiculed and harassed by other inmates on their way back from the work site, among other injuries.[9] The policy and practice of cuffing an inmate to a hitching post past the time when he constitutes a threat to himself or others violates the "broad and idealistic concepts of dignity, civilized standards, humanity and decency," *Estelle*, 429 U.S. at 102, 97 S.Ct. at 290 (quotation omitted), embodied in the Eighth Amendment.

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[9] In the words of the district court in *Austin*, "inmates placed upon the hitching post suffered extreme pain, anguish, humiliation, mental suffering, and resulting physical soreness and depression." *Austin*, 15 F.Supp. at 1256.

3. The Policy and Practice are Unconstitutional

We find that cuffing an inmate to a hitching post for a period of time extending past that required to address an immediate danger or threat is a violation of the Eighth Amendment. This violation is exacerbated by the lack of proper clothing, water, or bathroom breaks. We do not address the situation where this punishment or one similar to it is used for a short period of time after a physical altercation or other serious threat to prison safety to quell a disturbance and protect the safety of those around him. It is possible that there could be situations where an inmate would need to be temporarily cuffed to a stationary object for non-punitive purpose while the guards restored order. This is not that situation.

Our finding today is consistent with our ruling in *Ort v. White*, 813 F.2d 318 (11th Cir.1987), where a prison official refused to allow inmate Ort to drink water while on the chain gang until Ort agreed to work. In *Ort*, we found the official's action to be constitutional, in part because Ort "essentially had the keys to the water keg in his own pocket. Whenever he agreed to abide by the prison rules, he would be given water just like everyone else." *Id.* at 326. While the DOC claims that Hope would have been released from the hitching post had he asked to return to work, the evidence suggests that is not the case. First, Hope never refused to work. During the May incident, he was the victim in an altercation on the work site, but he never refused to do his job. During the June incident, Hope was involved in an altercation with prison guards. There is nothing in the record, however, claiming that he refused to work or encouraged other inmates to refuse to work. Therefore, it is not clear that the solution

to his hitching post problem was to ask to return to work. Second, Hope was placed in a car and driven back to Limestone to be cuffed to the hitching post on both occasions. Given the facts, it is improbable that had Hope said, "I want to go back to work," a prison guard would have left his post at Limestone to drive Hope back to the work site. It is more likely that the guards left Hope on the post until his work detail returned to teach the other inmates a lesson.

Herein lies the crux of our finding that the guards' placing Hope on the hitching post for extended periods of time was unconstitutional: there is no evidence in the record that Hope posed a continuing threat to prison safety while being transported from the work site to the prison or once he arrived at the prison itself. There is no evidence that Hope would have been a continuing threat had he remained at the work site. In *Williams v. Burton*, 943 F.2d 1572 (11th Cir.1991) (per curiam), we found that the prison officials did not violate the Eighth Amendment by using four-point restraints to control an inmate who "was trying to incite other inmates to join him in a prison disturbance . . . [that] posed a significant security concern." *Williams*, 943 F.2d at 1575. We stated, however, that,

> once restraints are initially justified, it becomes somewhat problematic as to how long they are necessary to meet the particular exigent circumstances which precipitated their use. The basic legal principle is that once the necessity for the application of force ceases, any continued use of harmful force can be a violation of the Eighth and Fourteenth Amendments, and any abuse directed at the prisoner after he terminates his

> resistance to authority is an Eighth Amendment violation. *Id.* at 1575-76.

This rule was also applied earlier in *Ort*, where we acknowledged that, "we might have reached a different decision if later, once back at the prison, officials had decided to deny appellant water as punishment for his refusal to work." *Ort*, 813 F.2d at 326.

For the above-stated reasons, we find that the policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses that necessary to quell a threat or restore order is a violation of the Eighth Amendment. It is our intention that this holding serve as a bright-line rule for any future case involving the use of a hitching post by prison authorities. *See County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708 (1998) ("[I]f the policy of avoidance [of constitutional issues] were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment of both officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional.").

B. The Guards Are Entitled to Qualified Immunity

Despite the unconstitutionality of the prison practice and, therefore, the guards' actions, there was no clear, bright-line test established in 1995 that would survive our circuit's qualified immunity analysis. Therefore, we affirm the district court's grant of summary judgment for the defendants on qualified immunity grounds.

Public officials are entitled to qualified immunity from monetary damages if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). The qualified immunity test is "one of objective legal reasonableness, without regard to whether the government official involved acted with subjective good faith." *Swint v. City of Wadley, Ala.*, 51 F.3d 988, 995 (11th Cir.1995).

The law on qualified immunity in our circuit is clear. When analyzing a qualified immunity defense, "[w]e look to whether a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred." *Id.* (citations omitted). Thus, "to be 'clearly established,' the federal law by which the government official's conduct should be evaluated must be preexisting, obvious and mandatory so that a similarly situated, reasonable government agent would be on notice that his or her questioned conduct violates federal law under the circumstances." *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1185 (11th Cir.1994).

Hope argues that several of our cases, including *Gates* and *Ort*, established a bright-line rule against use of the hitching post. While we recognize that the inappropriateness of the hitching post could be inferred from these opinions, a bright-line rule for qualified immunity purposes "is not to be found in abstractions – to act reasonably, to act with probable cause, and so forth – but in studying how these abstractions have been applied in concrete circumstances." *Lassiter v. Alabama A&M Univ.*

Bd. of Tr., 28 F.3d 1146, 1150 (11th Cir.1994) (citations omitted). It is important to analyze the facts in these cases, and determine if they are "materially similar" to the facts in the case in front of us. *Suissa v. Fulton County, Ga.*, 74 F.3d 266, 269-70 (11th Cir.1996) (per curiam) (citations omitted). Though analogous, the facts in *Gates* and *Ort* are not "materially similar" to Hope's situation. In *Ort*, the defendant was refused water while at a work site, until he agreed to do his job of carrying water to the work site. *Ort*, 813 F.2d at 326. *Gates* was an even more distinct case, as it involved an effort to make substantial changes based on the unconstitutional "conditions and practices in the maintenance, operation and administration" of a prison. *Gates*, 501 F.2d at 1295. We do not find that the language in *Gates*, *Ort*, or any other Eleventh Circuit or Supreme Court opinion established that impermissible use of the hitching post constitutes cruel and unusual punishment clearly enough that "a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987).

III. CONCLUSION

The practice of leaving an inmate cuffed to a hitching post when he no longer presents a threat to himself or those around him is a violation of that prisoner's Eighth Amendment right to be protected from cruel and unusual punishment, particularly when he is denied water and bathroom breaks. In 1995, however, there was no case law in this circuit with facts and legal analysis clear enough to serve as a bright-line rule establishing this violation, so the prison guards cannot be held financially responsible

for their actions. Accordingly, we AFFIRM the judgment of the district court.

United States Court of Appeals

For the Eleventh Circuit

No. 00-12150

District Court Docket No.
96-02968-CV-BU-S

LARRY HOPE,

Plaintiff-Appellant,

versus

MARK PELZER, Sergeant, Correctional Officer II, GENE MCCLARAN, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

JUDGMENT

(Filed Febr. 2, 2001)

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: February 2, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12150-DD

LARRY HOPE,

Plaintiff-Appellant,

versus

MARK PELZER, Sergeant, Correctional Officer II,
MCCLARAN, Correctional Officer I,
KENT, Correctional Officer I,
JACKSON, Correctional Officer I,
MAGUEE, Correctional Officer I,
STEPHEN, Officer, COI,
LAUGAN, Correctional Officer I,
GATES, Lieutenant,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama

(Filed May 7, 2001)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___F.2d___).

Before: TJOFLAT and BIRCH, Circuit Judges, and VINING*, District Judge.

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* Honorable Robert L. Vining, Jr., U.S. District Judge for the Northern District of Georgia, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch
UNITED STATES CIRCUIT JUDGE